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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 652

McALLISTER LIGHTERAGE LINE, INC.,
Appellant,

vs.

MARY RIVAS, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS OF JOSE RIVAS, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RUSSELL CONWELL GAY,
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Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for a writ of certiorari	1
Opinions below	1
Jurisdiction	2
Statute involved	2
Summary statement of matter involved	2
The questions presented	5
Reasons for granting the writ	5
Conclusion	8
Appendix—Jones Act	10

Table of Cases Cited

Asprodites v. *Standard Fruit & Steamship Co.*, 108 F. (2d) 788, 310 U. S. 642	3, 5, 6
Atchison, Topeka & Santa Fe R. R. Co. v. *Toops*, 281 U. S. 351	3, 5, 6
Brady v. *Southern Railway Co.*, 320 U. S. 476	3, 5, 6
Bunt v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483	7
New York Central R. R. Co. v. *Ambrose*, 280 U. S. 486	3, 5, 6

Statutes Cited

Federal Employers Act	5
Jones Act, 46 U. S. C. A. 688; Act of June 5, 1920, C. 250, Sec. 33, 41 Stat. 1007	2, 10
Judicial Code, Section 240(a), as amended by the Act of February 13, 1925	2

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McAllister Lighterage Line, Inc. prays that a Writ of Certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on November 16th, 1945, which affirmed a judgment of the District Court for the Southern District of New York, in favor of the appellee.

Opinions Below

The District Court filed no written opinion. The opinion of the United States Circuit Court of Appeals for the Sec-

ond Circuit is as yet unreported but has been added to the record (R. 227).

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925.

Statute Involved

Section 33 of the Act of June 5th, 1920, Chap. 250, 41 Stat. 1007, 46 U. S. C. 688, commonly known as the Jones Act, provisions of which are set forth in the appendix, is involved.

Summary Statement of Matter Involved

The action was brought in the United States District Court for the Southern District of New York, under the Jones Act (R. 4) by the widow of Jose Rivas, to recover damages for the loss of life of Jose Rivas, a fireman aboard the Lighter Express, who was found dead in the fire room of the vessel on the morning of August 24th, 1943 (R. 110). There were no witnesses to the accident which is alleged caused his death (R. 199).

Plaintiff's counsel made no opening statement to the jury and ignored the Trial Court's suggestion that he give the jury "some kind of an idea what this situation is" as the trial progressed (R. 17). At the end of the case, neither the plaintiff's counsel, defendant's counsel nor the Court knew "what particular negligence of the defendant the plaintiff was relying on" (R. 197, 201). Fairness under our system demands that a defendant be informed (at least during the trial) of the charge of negligence under which it is to be held liable. The Circuit Court of Appeals has written an opinion in which it neither cites nor discusses a single case or authority, and has itself speculated on the

cause of the accident. There is no person today who can say how the accident happened, much less state what the negligence of the defendant was and whether or not it was the competent producing cause of the said accident.

This petition for a Writ of Certiorari involves only questions of law, which, as set forth on page 5, relate to (a) whether the requisite proof necessary for a recovery under the Federal Employers' Liability Act established by decisions of this Court, is necessary to the same extent for a recovery under the Jones Act; (b) whether the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court in *Brady* v. *Southern Railway Co.*, 320 U. S. 476, *Atchison, Topeka & Santa Fe R. R. Co.* v. *Toops*, 281 U. S. 351, and *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 496; (c) whether the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Asprodites* v. *Standard Fruit & Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S. 642; (d) in an action under the Jones Act, whether the testimony of an expert witness, who assumes facts contrary to the facts stated in the hypothetical question, and who then adds other facts concerning which there is no testimony whatsoever and gives his opinion as to a cause of an accident, is sufficient to warrant the trial Court in submitting the case to the jury; and (e) whether there was error in the ruling holding the case properly submitted to the jury by the trial Court.

The theory upon which the case was submitted to the jury was that before the vessel started to move, the engineer Larsen moved the links which struck the deceased while he was standing up on a guard rail surrounding the eccentrics and that he was not warned by the engineer.

There is not one word of testimony in the whole record that the engineer ever moved the links before the vessel started to move. In fact the engineer Larsen testified to just the opposite, namely, that the crank was in a good position for starting (R. 60) and this fact was assumed in the hypothetical question propounded by the plaintiff to the expert (R. 175). Further, there is no dispute that the movement of the links which plaintiff claims struck the deceased would put the engine in a reversing position. The only testimony in the whole record that the links were ever shifted to a reversing position was just prior to the vessel being stopped.

After the engineer had testified, the plaintiff called an expert and a long hypothetical question was propounded to him which assumed among other things that "the crank of the engine was in a good position for starting" (R. 175). In answering this hypothetical question the expert assumed just the opposite, namely, that the crank was not in a good position for starting and that the deceased was struck by the links being moved into a reversing position in preparation for starting (R. 178). This could not be so because the vessel first moved forward and there is no testimony indicating that there was any necessity for the links being so moved.

Furthermore, this expert assumed two additional facts not stated in the question, namely, that the deceased at the time was standing up on a guard rail around the eccentrics (R. 182) and that deceased was not injured after the engine had been operating (R. 180). There is not one word of testimony in the record concerning these two assumed facts.

We respectfully submit that when a theory of an action is predicated upon an opinion of an expert who assumes the opposite of the facts proved and adds others concerning which there is no testimony, the plaintiff has not made out a

case. To submit such a situation to a jury calls for nothing less than mere speculation and conjecture, and violates the rule of this Court in cases decided under the Federal Employers' Liability Act.

The Questions Presented

(1) Whether the requisite proof necessary for a recovery under the Federal Employers' Liability Act established by decisions of this Court, is necessary to the same extent for a recovery under the Jones Act.

(2) Whether the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court in *Brady* v. *Southern Railway Co.*, 320 U. S. 476; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Toops*, 281 U. S. 351, and *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486.

(3) Whether the decision of the Circuit Court of Appeals for the Second Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Asprodites* v. *Standard Fruit & Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S. 642.

(4) In an action under the Jones Act, whether the testimony of an expert witness who assumes facts contrary to the facts stated in the hypothetical question and who then adds other facts concerning which there is no testimony whatsoever and gives his opinion as to a cause of an accident, is sufficient to warrant the trial Court in submitting the case to the jury.

(5) Whether there was error in the ruling holding the case properly submitted to the jury by the trial Court.

Reasons for Granting the Writ

While this Court has written concerning the necessary proof in death actions brought pursuant to the Federal

Employers' Liability Act, it has not written, so far as research discloses, on the necessary proof in a death action brought under the Jones Act. It would seem clear there should be no distinction between the two Acts, yet the Circuit Court of Appeals in this case has refused to follow the law laid down by this Court in the cases involving the Federal Emplcyers' Liability Act. *Brady* v. *Southern Railway Co.*, 320 U. S. 476; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Toops*, 281 U. S. 351, and *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486.

In the three cases cited hereinabove, this Court has laid down the definite and unequivocal rule that in death actions brought under the Federal Employers' Liability Act, a case should not be submitted to a jury where the jury's verdict would rest only upon speculation and conjecture either as to negligence or proximate cause.

In the case at bar, not only did the Trial Court permit the jury to speculate upon the issues of negligence and proximate cause, but also the Circuit Court of Appeals for the Second Circuit not only has confirmed the guesswork of the jury but also has proceeded itself to speculate on the cause of the accident.

The basic issues here are matters of general public importance because there are pending many cases brought pursuant to the provisions of the Jones Act and the Admiralty Bar generally should be informed by this Court with reference to these matters.

The Circuit Court of Appeals for the Fifth Circuit has reached the conclusion that the decisions of this Court involving death actions brought pursuant to the Federal Employers' Liability Act, are equally applicable to death actions brought pursuant to the provisions of the Jones Act, as shown by the case of *Asprodites* v. *Standard Fruit & Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S.

642. The opinion of the Circuit Court of Appeals for the Second Circuit, in the instant case, is opposed to and in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit. This conflict should be finally resolved by a decision of this Court in the public interest not only of uniformity of decision in the various Circuits but as stated hereinbefore so that the Admiralty Bar may be fully informed concerning this important question. The case at bar is a typical example of the frame of mind which experience shows prevails among the Trial Judges and Judges of the Circuit Court of Appeals in the Second Circuit that in death actions the Jones Act is to be applied almost as a Workman's Compensation Act.

The Circuit Court of Appeals refused to discuss any legal problem except whether there was sufficient evidence to support the verdict which, of course, is an issue of law. The Circuit Court reviewed the testimony in detail and in reciting the facts, it embraced all of the important facts testified to by the engineer Larsen, except the vital one and upon this one the Circuit Court said his testimony should be disbelieved. The burden of proof is on the plaintiff in an action of this character, and the absence of proof cannot be supplied by discrediting or disbelieving the only witness to the facts. This Court clearly so held in *Bunt* v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483, 485.

The Circuit Court admitted that if there was a theory other than that upon which the Court and jury speculated, which theory would agree with the facts equally well, the plaintiff must fail. One of the theories which the Court itself expounded could not be ruled out of consideration entirely even by the Circuit Court. It said that under the circumstances it was doubtful whether the decedent was killed by other parts of the moving machinery but could state no facts lending weight to that doubt. The Circuit

Court's doubt in this regard is suggested to be based on the fact that if Rivas had been standing on the floor, the speed of the eccentric rods laterally might not be sufficient to cause the severe injury but the Court refused to discuss whether such a blow could come from the eccentric rods if the decedent was standing on the guard rail so that his head would be high enough to be struck with the lateral force of the eccentric rods.

The balance of the Circuit Court's opinion is based upon discussing another theory arising out of medical testimony concerning how long the decedent probably lived after he was struck the blow. This is really an attempt to apply a scientific theory of time to a case where there never was any definite time fixed for any event and by reading a doctor's testimony in the most peculiar fashion. A doctor testified that the decedent could not have lived more than a few minutes after the blow was struck and could not have lived more than five or ten minutes at the most (R. 140). The Circuit Court has said this testimony means it was the doctor's opinion the decedent lived a minimum of five minutes after he was struck the blow which killed him.

While there is no reference to the fact in the opinion of the Circuit Court of Appeals, the only reason this case ever was submitted to the jury in the first place was because a theory was involved by a marine engineer. His thoughts are re-expressed in part in the opinion of the Circuit Court yet plaintiff's counsel was compelled to abandon the expert's testimony on the appeal and one would never know from reading the Circuit Court's opinion that such an expert had ever testified at the trial.

Conclusion

The decision below is incorrect. It decided a question of substantial general importance that is in conflict with applicable decisions of this Court and in conflict with the

decisions of the Circuit Court of Appeals for the Fifth Circuit and generally deals with a problem which should be clarified by the decision of this Court for the benefit of the Admiralty Bar.

It is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Russell Conwell Gay,
Edward J. Behrens,
Counsel for Petitioner.

APPENDIX

Jones Act, 46 U. S. C. A. Sec. 688; June 5, 1920 C. 250, Sec. 33, 41 Stat. 1007.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the U. S. modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

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MARY RIVAS, as Administratrix of the Goods, Chattels and Credits of JOSE RIVAS, deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
STATEMENT	1
RELIEF SOUGHT BY PETITIONER	2
THE FACTS	2
POINTS:	
POINT I Decision of Circuit Court is not in conflict with decisions of this Court or other Circuit Courts	5
POINT II The decision of this Court in *Tennant* v. *Peoria & Pekin Union Railway Co.*, is controlling in the present case	7
CONCLUSION	8

TABLE OF CASES

Asprodites v. *Standard Fruit and Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S. 642	6
Atcheson, Topeka & Santa Fe R. R. Co. v. *Toops*, 281 U. S. 315	5
Brady v. *Southern Railway Co.*, 320 U. S. 476	5, 7
New York Central R. R. Co. v. *Ambrose*, 280 U. S. 486	5
Tennant v. *Peoria & Pekin Union Railway Co.*, 321 U. S. 29	7

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Statement

The respondent recovered a jury verdict in the United States District Court for the Southern District of New York in the sum of Twenty-five thousand ($25,000.00) Dollars for the wrongful death of her intestate husband under the Jones Act (R. 4). After a three day trial the petitioner offered no defense but rested on the evidence presented by the respondent. The District Court charged that the respondent contended that the petitioner was negligent in that its engineer, LARSEN, failed to warn the intestate, RIVAS, that he, LARSEN, was about to operate the engine, and that that issue, to wit: insufficient warning was the

sole issue before the jury. The jury found in favor of the respondent and the petitioner appealed to the Circuit Court of Appeals for the Second Circuit. The respondent raised on that appeal the identical question which it seeks to raise in this Court, to wit: the insufficiency of evidence. The Circuit Court of Appeals in a comprehensive opinion discussed at great length the evidence before the Court and jury and concluded its opinion in words as follows: (R. 227)

> "Indeed, had we been charged with deciding the facts, we should have unhesitatingly concluded that Rivas was killed exactly as the plaintiff argued."

Relief Sought by Petitioner

Nowhere in the petition is a legal question raised. The contention here, as in the Courts below, is purely a question of fact. Petitioner's whole grievance is that it cannot agree with the jury's interpretation of the evidence presented.

The Circuit Court in its opinion discussed in great detail the evidence upon which the jury might have found that the respondent's intestate met his death by reason of the negligence of petitioner's engineer in failing to warn the said intestate in advance of moving or activating the engine or any part thereof. Far from finding the jury's verdict based on conjecture, the Circuit Court, after considering the evidence in full detail, "unhesitatingly" endorsed the jury's finding that the death of Rivas was caused exactly as respondent contended.

The Facts

Respondent's intestate Rivas was a fireman aboard petitioner's steam lighter. While Rivas was standing on the railing in front of the engine cleaning the engine frame in the regular performance of his duties as fireman he was

struck a crushing blow on the right forehead by the reversing links solely controlled above by the lighter's engineer.

Rivas, and one Larsen, petitioner's engineer, entered the engine room sometime before 8 o'clock on August 24th, 1943. (R. 57-58). Larsen remained in the upper portion of the engine room. Rivas went down below to the portion of the engine room referred to as the fire room, (R. 57) a small compartment between the boilers amidships and the engine frame astern (R. 30). The lighter was due to proceed from the center of the pier, where it had been tied up for some nine hours, to the end of the pier sometime at or after 8 o'clock (R. 124-126). During the interval and before any bells were received Larsen was engaged in getting ready to proceed to the end of the pier and while he could not see the whole fire room, he did know that Rivas was cleaning up down below and in fact saw him in this process and spoke to Rivas regarding such cleaning. Aside from this speech with Rivas, Larsen at no time thereafter spoke to or saw Rivas (R. 63). In due course a jingle bell to stand by was received, followed shortly thereafter by a forward signal at half speed, a full speed signal, and a few seconds before coming into the pier, a signal to kick the engine into reverse to stop headway. During this time, Larsen testified the steam had been rising steadily. (R. 63)

Immediately upon coming into the pier, Larsen looked down and saw Rivas stretched out on the starboard side of the fire room, his feet approximately even with the center pole which holds up the railing around the eccentrics, his feet being further to the stern than his head. (R. 78-79). Within a few seconds, Larsen was down in the fire room and the wound on Rivas' head had already stopped bleeding upon his arrival. (R. 103).

The voyage from the middle of the pier to the end of the pier took a maximum of from five to ten minutes. (R. 68, 130). The reversing process engaged in by Larsen for the purpose of controlling headway at the end of the pier was a matter of only seconds before he observed the body of Rivas lying on the floor space below him. (R. 70).

Dr. Edward Alpert, the Jersey City police surgeon who examined the body of Rivas, testified that the type of blow causing the death was a "terrific blow" coming from the right side, that it was a straight smash, and that the wound would have bled for a period of between five and ten minutes.

Robert Haight, an expert, testified that the only instrumentality in the fire room which had sufficient power to cause such an injury was the reversing links which were operated independently of the engine proper by a steam ram. R. 166). He testified further that the reversing mechanism, prior to starting the engine, was employed to put the eccentrics in a proper position for starting. (R. 173).

Lopez, a fireman, who usually relieved Rivas aboard this lighter testified that standing upon the railing around the eccentrics was the only manner in which the upper part of the engine frame could be reached for cleaning and that it was the duty of the fireman to have the engine room cleaned before turning over to the new watch that relieved him. (R. 116).

Larsen admitted that no ladder or other instrument was provided for use in the fire room proper. (R. 93).

After hearing all of respondent's witnesses, the expert, Haight, testified that in his opinion the blow described by the doctor could only have been received by Rivas while standing on the railing (R. 177); and that it could only have been received by him prior to any bells and when the engine was being readied for operation. (R. 176-181). He proved by demonstration that the accident could not have happened in any other manner.

Larsen admitted that he gave no warning at any time that morning to Rivas (R. 86); that he made no attempt to ascertain the whereabouts of Rivas in the fire room prior to moving the engine even though he admitted also that it was his duty, as the person having complete charge of the

engine and reversing controls, to ascertain that nothing was at or near these instruments prior to moving them. (R. 76).

At the end of the respondent's case the petitioner failed to offer any evidence to rebut or vary respondent's case.

POINT I

Decision of Circuit Court is not in conflict with decisions of this Court or other Circuit Courts.

The petitioner attempts to convey the thought that *Brady* v. *Southern Railway Co.*, 320 U. S. 476, is in conflict with the decision of the Circuit Court of Appeals in the instant case. The question raised in the North Carolina State Court in that case was whether the death could have been caused by employees of the respondent or by the decedent himself. To find for one would not exclude the other and therefore clearly the answer could only be arrived at through speculation. In the present case the machine causing decedent's death was wholly within the control of the petitioner's engineer. There is no evidence to sustain any other possible contention than that this machine was the actual cause of death. Petitioner's employee admits that no warning of any kind was given. (R. 86) The physical facts surrounding the occurrence gave the jury, in the instant case, more than sufficient evidence to find as they did.

In *Atcheson, Topeka & Santa Fe R. R. Co.* v. *Toops*, 281 U. S. 315, there was no evidence of the surrounding circumstances from which any inferences could be drawn hence to find in favor of the plaintiff would have involved considerable conjecture on both the question of negligence and the question of proximate cause.

In *New York Central R. R. Co.* v. *Ambrose*, 280 U. S. 486, the facts were such that there was no alternative but to find that the decedent acted in disobedience of direct orders

to avoid the instrumentality that caused his death and further there was a complete lack of any evidence of surrounding facts to explain how he actually did fall into the bins in which he was found dead a short time after last being seen in their locality.

How the petitioner can claim that the Circuit Court of Appeals by its decision has put this case in conflict with those above mentioned is hard to understand. The opinion of the Court below almost in its entirety was devoted to an exposition of the evidence which the Court felt raised sufficient inferences upon which a jury could reasonably draw the conclusion that the injuries suffered by the respondent's intestate were caused by the negligence of the petitioner.

Apropos of the purported conflict in the decision of the present case with that of the Circuit Court of Appeals for the Fifth Circuit in *Asprodites* v. *Standard Fruit and Steamship Co.*, 108 Fed. (2d) 728, cert. den. 310 U. S. 642, there can be no comparison worthy of argument. In the *Asprodites* case, there was no jury verdict involved and the legal question discussed and decided was solely whether the plaintiff in a death action under the Jones Act could rest on the theory of *res ipsa loquitur* after showing the occurrence and the death resulting therefrom. The record in the present case will disclose that no such theory was raised or contemplated on the trial of this action nor on the appeal.

The conflict between this case and those cited above, if any, is one of fact and not of law.

POINT II

The decision of this Court in *Tennant* v. *Peoria & Pekin Union Railway Co.*, is controlling in the present case.

The petitioner lays great emphasis upon the *Brady* case throughout his application to this Court. No mention, however, is made of the later case of *Tennant* v. *Peoria & Pekin Union Railway Co.*, 321 U. S. 29. By a happy coincidence the facts in the *Tennant* case and those in the respondent's are so closely analagous that we may well rely upon this Court's holding in that case to confound all the contentions advanced by the petitioner herein.

The petitioner seeks to argue in this case that the absence of eye witness testimony regarding the precise whereabouts of respondent's intestate at the time he met his death, leaves any determination of how he lost his life to speculation and conjecture. As was indicated by this Court in the *Tennant* case the surrounding circumstances—the location of the body, blood stains and so forth—constitutes strong evidence of the manner and locale of the death. The respondent's contention that the intestate was standing on the railing surrounding the engine frame is buttressed by the fact that the links were the only instrumentality in the engine room that had sufficient power to cause the injuries testified to by the police surgeon. The absence of eye witnesses was definitely held by this Court not to be decisive.

As a matter of fact this Court added to the evidence before it in the *Tennant* case the legal presumption that decedent was actually engaged in the performance of his duties and exercised due care for his own safety at the time of his death, where there was no evidence which could be called upon to dispute such a presumption. Clearly in the present record no evidence was produced to dispute such a presumption. The only witness who testified to the facts and circumstances surrounding the accident was the peti-

tioner's own engineer who testified that the respondent's intestate was engaged in the performance of his duties and in fact supplemented his testimony with compliments to the said intestate's ability as a fireman and oiler. The only point upon which the said engineer could not testify with any certainty was the exact position of the decedent during the time the engine was in operation. Yet his testimony was clear and convincing that not knowing the precise whereabouts of the fireman he moved the engine without first warning the fireman of his intentions. As was held in the *Tennant* case, such a movement without a warning was clearly dangerous to life and limb.

CONCLUSION

The petition for a writ of certiorari should be denied.

(The Court is respectfully informed that the respondent, widow of deceased and her infant daughter, having been deprived of the support of her husband, are both at present in dire need of financial aid and this Court is respectfully requested to grant to this application such preference as may be afforded it under the rules and practice in this Court.)

Respectfully submitted,

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